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No. 82-862

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CONSOLIDATED RAIL CORPORATION,
Petitioner,
v.
LEE ANN LESTRANGE DARRONE,
as administratrix of the Estate of
THOMAS LESTRANGE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF AMICI CURIAE OF THE AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, THE NATIONAL ASSOCIATION OF THE DEAF, THE AFFILIATED LEADERSHIP LEAGUE OF AND FOR THE BLIND OF AMERICA, THE AMERICAN COALITION OF CITIZENS WITH DISABILITIES, THE DEVELOPMENTAL DISABILITIES ADVOCACY NETWORK, AND THE AMERICAN DEAFNESS AND REHABILITATION ASSOCIATION, INC.

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QUESTIONS PRESENTED BY AMICI

1. Whether a handicapped applicant for employment may maintain an employment discrimination action under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, as amended, where the primary objective of the employer's federal financial assistance is unrelated to employment.

2. Whether a private right of action exists under Section 504 of the Rehabilitation Act of 1973.

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INTEREST OF AMICI CURIAE

Pursuant to Rule 36 of the Rules of the Supreme Court,[1] the amici file this brief in support of the respondent, Lee Ann LeStrange Darrone.

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[1] Letters of Consent to the filing of this brief are being lodged with the Clerk of the Court.

The American Federation of State, County and Municipal Employees, AFL-CIO, "AFSCME" is a labor organization which represents more than one million public employees across the country, including many disabled employees. AFSCME is committed to the eradication of all forms of employment discrimination, including discrimination against disabled people.

The National Association of the Deaf is a national non-profit organization with approximately 18,000 members who are hearing impaired adults, parents of hearing impaired children, and professionals in the area of services to deaf individuals. The National Association of the Deaf is the largest consumer organization of hearing impaired people in the United States.

The Affiliated Leadership League of and for the Blind of America is a non-profit organization consisting of eighty national, state, and local organizations of and for blind people including almost all of the national organizations of and for blind people. The Affiliated Leadership League is dedicated to advancing the rights and services for blind people especially in employment.

The American Coalition of Citizens with Disabilities was founded in 1974 to secure and enforce the civil and human rights of all people with physical and mental disabilities. The national, state and local organizational members represent virtually every category of physical and mental disability.

The Developmental Disabilities Advocacy Network (DDAN) is an independent, non-profit agency which has been designated by the Governor of Pennsylvania as the Commonwealth's Protection and Advocacy System. DDAN is responsible for providing protection and advocacy services to Pennsylvania's developmentally disabled persons, including developmentally disabled adults adversely affected by discrimination in employment by recipients of federal financial aid.

The American Deafness and Rehabilitation Association, Inc. (ADARA) is a national organization of professional rehabilitation workers with adult deaf citizens. One of the purposes of ADARA is to promote the development and expansion of professional rehabilitation services and employment opportunities for adult deaf citizens.

SUMMARY OF ARGUMENT

I

The language, legislative history and administrative interpretations of Section 504 of the Rehabilitation Act of 1973, when originally enacted and as amended in 1978, all support the coverage of employment discrimination regardless of the purpose of the federal funding. The language of Section 504 is almost identical to Section 901 [Title IX] of the Education Amendments of 1972, 20 U.S.C. § 1681. For reasons similar to this Court's analysis of Title IX in *North Haven Board of Education v. Bell*, 456 U.S. 512 (1982), Section 504 "neither expressly nor impliedly excludes employees from its reach."

Throughout the legislative history of the Rehabilitation Act of 1973 and the 1978 Amendments, Congress stressed the objective to enhance employment opportunities for handicapped individuals and realized that, in order to achieve this purpose, handicapped individuals must be able to challenge employment discrimination in any program. Petitioners maintain that Section 505(a)(2) of the 1978 Rehabilitation Act Amendments incorporates the employment limitation of Section 604 of Title VI. But the language of Section 604 limits *federal departments and agencies*, not individuals, from taking action against discriminatory employment practices except where a primary objective of the federal financial assistance is to provide employment. The legislative history of Section 604 reveals it was never intended to restrict the rights of individuals, only to prevent administrative overkill.

Section 505(a)(2), which incorporated Title VI remedies, procedures and rights into the enforcement of Section 504, was intended to codify the Department of Health, Education, and Welfare's (HEW) enforcement practices. The HEW Section 504 Regulation did not adopt the limitation found in Section 604. Thus, Congress, which was aware of this Regulation, did not intend its 1978 Amendments to incorporate such a restriction. Indeed, the new Section 505 which included a provision for attorneys' fees, Section 505(b), clearly demonstrates Congress' intent "to enhance the abilities of handicapped individuals to assure compliance with the civil rights provisions of Title V." *S. Rep. No. 95-890*, 95th Cong., 2d Sess. 18 (1978). The lead Section 504 enforcement agencies, HEW and the Department of Justice, have been consistent in their interpretation that Section 504 covers employment discrimination regardless of the purpose of the federal assistance.

II

Petitioner admits that the private right of action issue was not briefed, argued or decided in either court below. *See* Petitioner's Cert. Petition at 21. Accordingly, under well-settled doctrine this Court should not consider this issue.

In any event, *Cannon v. University of Chicago*, 441 U.S. 677 (1979) and *Guardians Association v. Civil Service Commission of the City of New York*, No. 81-431, 51 U.S.L.W. 5105 (U.S. July 1, 1983), compel the conclusion that Section 504 confers a private right of action. This conclusion is consistent with all federal courts of appeals that have ruled on the issue. Moreover, consideration of all four factors identified in *Cort v. Ash*, 422 U.S. 66, 78 (1975), to determine whether a private remedy is to be implied, shows that Congress intended Section 504 to confer a private right of action in favor of handicapped individuals.

Petitioners further argue that if a private right of action does exist under Section 504, an individual can obtain only injunctive, not monetary relief. This issue of relief under Section 504 was neither raised nor considered in the courts below. The application of *Guardians Association* to the issues of whether an intent to discriminate exists in this case or whether an intent to discriminate ever is a requisite to compensatory relief under Section 504 depends upon a proper record. Since there is no record on these issues in the courts below, this Court cannot consider them now.

Petitioner's program-specificity argument was likewise neither raised nor considered in the lower courts. No evidence was taken on whether federal money went to the particular program in which respondent was employed. Under this Court's established practice, this issue should be remanded.

ARGUMENT

I. SECTION 504 PROHIBITS EMPLOYMENT DISCRIMINATION REGARDLESS OF THE PURPOSE OF THE FEDERAL FINANCIAL ASSISTANCE.

The major purpose of the Rehabilitation Act of 1973 was to significantly expand employment oportunities for disabled people. Congress recognized that in order to achieve this goal, discrimination must be eliminated. Congress passed Title V, including Section 504, to root out this discrimination. Section 505 of the 1978 Amendments to the Rehabilitation Act expanded the remedies available for disabled people to combat discrimination, especially in employment. The language, legislative history and administrative interpretations of Section 504 and its amendments all support its coverage of employment discrimination without regard to the purpose of the federal funding.

A. Section 504 On Its Face Prohibits Employment Discrimination.

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, as amended, provides, in pertinent part:

> "No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under *any program or activity receiving federal financial assistance* . . ." (emphasis added)

The statute itself applies to *any* programs receiving federal aid. Nothing in this language indicates that it was intended to reach only those programs receiving federal financial assistance for the primary purpose of providing employment. *See Jones v. Metropolitan Atlanta Rapid Transit Authority*, 681 F.2d 1376, 1379 (11th Cir. 1982), *petition for cert. pending*, No. 82-1159 (filed Jan. 11, 1983).

In *North Haven Board of Education v. Bell*, 456 U.S. 512 (1982), this Court reviewed the same question under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1686, a statute with language almost identical to Section 504. This Court first looked at the language of the statute itself to determine whether it includes employment:

> "Section 901(a)'s broad directive that 'no person' may be discriminated against on the basis of gender appears, *on its face*, to include employees as well as students. Under that provision, employees, like other 'persons', may not be 'excluded from participation in', 'denied the benefits of,' or 'subjected to discrimination under' education programs receiving federal financial support." (emphasis added)

North Haven, 456 U.S. at 520.

Just as Title IX's inclusion of "person" thereby includes employees, so too, Section 504's coverage of "other-

wise qualified handicapped individuals" includes employees. This is especially true in a statute that links vocational training with equal opportunity guarantees. Both Section 504 and Title IX are remedial civil rights statutes in origin, and therefore must be accorded a "sweep as broad as [their] language." *See North Haven*, 456 U.S. at 521; *Carmi v. Metropolitan St. Louis Sewer District*, 620 F.2d 672, 677 (8th Cir. 1980) (opinion of McMillian, J., concurring).

Based on the reasoning used in *North Haven*, the Third Circuit in this case found as follows:

> "The statutory language of § 504 of the Rehabilitation Act and § 901 of Title IX being virtually identical, we are bound to conclude, like the Supreme Court in *North Haven*, that because § 504 'neither expressly nor impliedly excludes employees from its reach, we should interpret the provision as covering and protecting these 'persons' unless other considerations counsel to the contrary.'"

LeStrange v. Consolidated Rail Corp., 687 F.2d 767, 769-770 (3d Cir. 1982). *See also Jones*, 681 F.2d at 1379.

B. The Legislative History Of Section 504 Supports Coverage Of Employment.

1. *The original enactment of Section 504.*

The Rehabilitation Act of 1973 had as its purpose to "promote and expand employment opportunities in the public and private sector for handicapped individuals and to place such individuals in employment."[2] 87 Stat. 357;

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[2] So clear was Congress' purpose in enacting the Rehabilitation Act, that the original 1973 Act defined "handicapped individual" exclusively in terms of employability:

> "A handicapped individual is any individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employ-

see 29 U.S.C. § 701; *see also* 119 Cong. Rec. 24587-88 (1973) (statement of Senator Williams, sponsor of the bill and chairman of the Committee on Labor and Public Welfare.

All four sections of Title V create strong protections for handicapped individuals' employment rights. Sections 501 and 503 of Title V require the federal government and federal contractors, respectively, to take affirmative action in hiring and promoting handicapped individuals. *See* 29 U.S.C. §§ 791 and 793. Focusing solely on employment, these two sections contain no exception regarding the purpose of the federal funding. Section 502 of Title V, 29 U.S.C. § 792, created the Architectural and Transportation Barriers Compliance Board to enforce the Architectural Barriers Act of 1968, 42 U.S.C. §§ 4151-4157, which prohibits architectural barriers in federal and federally assisted buildings and facilities which may serve as employment sites for handicapped individuals. Congress also sought to remove transportation barriers that impede handicapped persons from going to work. *See* 29 U.S.C. § 792(c). Section 504, which prohibits discrimination by federal grantees, *in any program or activity*, was also intended to cover employment, without exception.

> "It is hard to imagine, in an Act whose primary goal is to enhance the vocational capabilities of the handicapped, that if the legislature had intended to limit the reach of a provision which immediately follows

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ability from vocational rehabilitation services provided pursuant to Titles I and III of this Act."

Section 7(6); 87 Stat. 361.

In 1974, Congress amended the definition of "handicapped individual" since it realized that Section 504 covered not only employment discrimination but other forms of discrimination as well. *See S. Rep. No. 1297*, 93d Cong., 2d Sess. 37 (1974), *reprinted in* [1974] U.S. Code Cong. and Ad. News 6373, 6387; *S. Rep. No. 93-1139*, 93d Cong., 2d Sess. 23 (1974).

> two sections whose express purpose is to encourage the hiring of the handicapped, that someone somewhere in the legislative history would have said so. On the contrary, several members indicated the opposite."

LeStrange, 687 F.2d at 773-774.

Congress clearly intended Section 504 to have a broad sweep, particularly with regard to employment.[8] *See* 119

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[8] Further support for this interpretation of employment coverage under Section 504 is found in the legislative history of two other acts.

During the enactment of the Education Amendments of 1974, Pub. L. 93-380, 20 U.S.C. §§ 1221-1233, the House Committee proposed Section 807, which would forbid discrimination against physically handicapped individuals in their attempts to secure employment as teachers in any federally funded program administered by the Office of Education. *See H.R. Rep. No. 93-805*, 93d Cong., 2d Sess. (1974), *reprinted in* [1974] U.S. Code Cong. and Ad. News 4093, 4155. In the Senate Conference Report, it was explained that this proposed section would not be included in the bill, *"because section 504 of the Rehabilitation Act of 1973, which is now in effect, prohibits such discrimination."* (emphasis added). *S. Rep. No. 93-1026*, 93d Cong., 2d Sess. (1974), *reprinted in* [1974] U.S. Code Cong. and Ad. News 4206, 4250.

In enacting the Education for All Handicapped Children Act of 1975, 20 U.S.C. §§ 1401-1461, the Conference Report stated:

> "It is clear that qualified handicapped individuals who, because of their handicap, are refused employment by recipients of assistance under the Act *are fully covered by the prohibition in section 504 of the Rehabilitation Act of 1973*. The conferees expect that the Department of Health, Education, and Welfare regulations implementing section 504 will cover employees of such recipients of Federal assistance under this Act." (emphasis added).

S. Rep. No. 94-455, 94th Cong., 1st Sess. 54 (1975), *reprinted in* [1975] U.S. Code Cong. and Ad. News 1480, 1504.

While these two acts do not involve Section 504 itself, their clear discussion of the scope of employment coverage under Section 504 indicates further Congressional intent that Section 504's scope not be limited to situations where the purpose of the federal funds is for employment. Subsequently enacted legislation declaring the in-

Cong. Rec. 5882 (statement of Senator Cranston); *id.* at 24587 (statement by Senator Taft); *id.* at 5887 (statement of Senator Javits).

2. *The 1978 Amendments to the Rehabilitation Act and their legislative history.*

Throughout the debates of the 1978 Amendments Congress understood that Section 504 was intended to cover employment discrimination by federal grantees. For example, in response to a proposed amendment by Senator McClure, to limit a court's remedies pursuant to Section 501, Senator Cranston responded:

> "The amendment offered . . . would create an unwise and unrealistic distinction with respect to employment between the obligations of the Federal Government and the obligations of Federal contractors and *grantees.* Ironically, the Senator's amendment would limit—with a financial test—the Federal Government's obligation of being an equal opportunity employer. *Federal* contractors and *grantees would—appropriately—continue to be required to be equal opportunity employers.*"

124 Cong. Rec. 30577-78 (1978). (emphasis added) *See LeStrange*, 687 F.2d at 775.[4]

This statement demonstrates that the chief sponsor of the 1978 Amendments considered that both Section 503 and Section 504 required equal opportunity in employment.

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tent of an earlier statute is entitled to great weight in statutory construction. *Glidden Co. v. Zdanok*, 370 U.S. 530, 541 (1962); *Federal Housing Administration v. The Darlington, Inc.*, 358 U.S. 84, 90 (1958).

[4] Discussions indicating Section 504's employment coverage also took place regarding a further amendment to the definition of handicapped individual, to exclude current alcohol or drug abusers from Section 504 coverage if such use prevented an individual from performing the duties of the job in question. *See* 124 Cong. Rec. 30323, 30324 (1978); *see also* 29 U.S.C. § 706(7)(A).

Further evidence of the scope of employment protection under Section 504 is found throughout the debates on the 1978 Amendments. *See H.R. Rep. No. 95-1149*, 95th Cong., 2d Sess. 16, 18, 23-29, 34, 38, 42-43 (1978); *H.R. Rep. No. 95-1188*, 95th Cong., 2d Sess. 4 (1978); *S. Rep. No. 95-890*, 95th Cong., 2d Sess. 8, 13, 20-21, 27, 36 (1978); *H.R. Conf. Rep. No. 95-1780*, 95th Cong., 2d Sess. 80-81, 94-96, 98, 102 (1978); 124 Cong. Rec. 30304 (1978) (remarks of co-sponsor Senator Randolph; *id.* at 30313-16 (remarks of Senator Javits); *id.* at 30327 (remarks of Senator Dole); *id.* at 37505-06 (remarks of Senator Randolph); *id.* at 13896-97 (remarks of Representative Brademas); *id.* at 13898-99 (remarks of Representative Biaggi); *id.* at 13902 (remarks of Representative Jeffords); *Rehabilitation Amendments of 1978 Hearings*, 95th Cong., 2d Sess. 93, 122, 179-84, 243-44 (1978).

C. Section 505(a)(2) Of The 1978 Rehabilitation Act Amendments Does Not Impose A Limitation To Section 504's Coverage Of Employment Discrimination.

Petitioners maintain that employment discrimination is only covered by Section 504 if a primary purpose of the federal funds received is to provide employment. They rely on the reasoning expressed in *Trageser v. Libbie Rehabilitation Center, Inc.*, 590 F.2d 87 (4th Cir. 1978), *cert. denied*, 442 U.S. 947 (1979), and adopted by three other federal courts of appeals.[8] In *Trageser*, the Fourth Circuit interpreted Section 505(a)(2) of the 1978 Rehabilitation Act Amendments[9] to limit employment cover-

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[8] *United States v. Cabrini Medical Center*, 639 F.2d 908 (2d Cir. 1981); *Carmi v. Metropolitan St. Louis Sewer District*, 620 F.2d 672 (8th Cir.), *cert. denied*, 449 U.S. 892 (1980); *Scanlon v. Atascadero State Hospital*, 677 F.2d 1271 (9th Cir. 1982), *petition for cert. pending*, No. 82-5812 (filed Nov. 22, 1982).

[9] Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978, 29 U.S.C. § 794a(a)(2).

age under Section 504 to those situations where "a primary objective of the federal assistance is to provide employment". 590 F.2d at 89.

Section 505(a)(2) provides as follows:

> "The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 . . . shall be available to any person aggrieved by an act or failure to act by any recipient of Federal assistance. . . ."

The Fourth Circuit concluded that the above language incorporated Section 604 of Title VI, which states:

> "Nothing contained in this subchapter shall be construed to authorize action under this subchapter *by any department or agency* with respect to any employment practice of any employer . . . except where a primary objective of the Federal financial assistance is to provide employment."

Section 604, 42 U.S.C. § 2000d-3 (emphasis added).

The *Trageser* court thereby applied Section 604's limitation on *federal departments and agencies* to *individuals* challenging employment discrimination under Section 504.

The purpose, language and legislative history of section 505 refute this severe limitation of Section 504's employment coverage. Congress never intended that federal money would be used to support employment discrimination by federal grantees. *See LeStrange*, 687 F.2d at 772-74; *Jones*, 681 F.2d at 1380-81.

1. *The purpose of Section 505(a)(2).*

The purpose of Section 505(a)(2) was to codify HEW's existing practice of extending the procedural provisions of Title VI to the enforcement of Section 504. As originally enacted, Section 504 did not specify enforcement procedures. Congress, however, expressed its intent in 1974 that a compliance mechanism be established similar to that in effect under Titles VI and IX:

> "The language of section 504, in following the above-cited Acts [section 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000 d-1, and section 901 of the Education Amendments of 1972, 20 U.S.C. § 1683], further envisions the implementation of a compliance program which is similar to those Acts, including promulgation of regulations providing for investigation and review of recipients of Federal financial assistance, attempts to bring non-complying recipients into voluntary compliance through informal efforts such as negotiation, and the imposition of sanctions against recipients who continue to discriminate against otherwise qualified handicapped persons on the basis of handicap."

S. Rep. No. 93-1297, 93d Cong., 2d Sess. 40 (1974), *reprinted in* [1974] U.S. Code Cong. and Ad. News 6373, 6390.

Regulations to implement the above-stated purpose were issued by HEW in 1977 pursuant to Executive Order 11914, 41 Fed. Reg. 17871 (1976). These regulations, which specifically prohibit employment discrimination, incorporated the procedural provisions of Title VI. In promulgating these regulations, HEW noted that the Section 504 regulations and Title VI regulations differed "in the extent to which it [Section 504] applies to employment practices." *See* 41 Fed. Reg. 29547-48 (1976).

In enacting Section 505(a)(2) in 1978, the Senate Committee specifically noted these HEW regulations and stated the purpose for the amendment:

> "It is the committee's understanding that the regulations promulgated by the Department of Health, Education and Welfare with respect to procedures, remedies, and rights under section 504 conform with those promulgated under Title VI. Thus, this amendment codifies existing practice as a specific statutory requirement."

S. Rep. No. 95-890, 95th Cong., 2d Sess. 19 (1978), *reprinted in* [1978] U.S. Code Cong. and Ad. News 7312.

The Eleventh Circuit in *Jones* further explained Congress' reason for adopting Section 505(a)(2):

> "Thus Section 505 was intended to encompass only those remedies, procedures and rights of Title VI found in the HEW regulations. Since the HEW regulations did not utilize or mention the restrictions found in Section 604 of Title VI, Congress obviously did not intend Section 505 to incorporate such a restriction into the Rehabilitation Act."

Jones, 681 F.2d at 1382.

2. *Section 505 expands the remedies available to handicapped individuals.*

Section 505(a)(2) of the 1978 Amendments is found in Section 505, entitled "Remedies and Attorneys' Fees". This section strengthens the ability of handicapped individuals to enforce their rights under Title V. Section 505(a)(1) extends powerful Title VII procedural remedies to handicapped federal employees and applicants, *see* 29 U.S.C. § 794a(a)(1), while Section 505(b) provides for attorneys' fees to encourage private suits under Section 504. *See* 29 U.S.C. § 794a(b). These provisions of Section 505 demonstrate Congress' intent to expand remedies available to handicapped persons to combat discrimination, not restrict them.

This intent to strengthen remedies is further shown in the 1978 legislative history. The Senate Report indicates that the new provisions of Section 505 are "designed to *enhance* the ability of handicapped individuals to assure compliance with the civil rights provisions of Title V." *S. Rep. No. 95-890*, 95th Cong., 2d Sess. 18 (1978). *See id.* at 19, 55. This view was reiterated by sponsors of the 1978 Amendments in Congressional floor debates. *See, e.g.*, 124 Cong. Rec. 30347 (statement by Senator Cranston); *id.* at 30311 (statement by Senator Stafford); *id.* at 30303 (statement by Senator Randolph); *id.* at 13901 (statement by Congressman Jeffords). *See also Scanlon*

v. Atascadero State Hospital, 677 F.2d 1271, 1274-75 (9th Cir. 1982) (opinion of Ferguson, J., dissenting); *Hart v. County of Alameda*, 485 F.Supp. 66, 70-71 (N.D. Cal. 1979).

If Congress had intended to narrow the rights available to handicapped individuals pursuant to Section 504, it would have done so specifically. Congress has shown in the legislative history of Title IX that if it intended to limit employment coverage by Section 604 of Title VI, it would have said so directly. When the House tried to limit employment coverage under Title IX, they proposed an amendment, Section 1004, that tracked the language of Section 604 verbatim. The House receded on this amendment in the Conference Committee. *S. Conf. Rep. No. 92-798*, 92 Cong., 2d Sess. 221 (1972); *H.R. Conf. Rep. No. 92-1085*, 92d Cong., 2d Sess. 221 (1972). *See also North Haven*, 456 U.S. at 528. Congress did not attempt to write this specific limitation into the 1978 Amendments. Congress had no intention of changing the substantive coverage of Title V, only to codify what it had earlier suggested as an appropriate mechanism for Section 504's enforcement.

3. *The language of Section 505(a)(2).*

The plain language of Section 505(a)(2) indicates that it is intended to expand the "remedies, procedures and rights" available to handicapped individuals to challenge discrimination, not to limit them by imposing the severe restrictions of Section 604. Congress envisioned the extension of Title VI remedies and procedures for effecting compliance with 42 U.S.C. § 2000d, as set forth in 42 U.S.C. § 2000d-1, and the right to judicial review of administrative agency actions, as set forth in 42 U.S.C. § 2000d-2.[7] *See* discussion of above terms and their legal

[7] Several other sections of Title VI are inapplicable in the Section 504 context, e.g., 42 U.S.C. §§ 2000d-5 and 6, further demonstrating that not all Title VI provisions were intended to be incorporated into enforcement of Section 504.

meaning in *Jones*, 681 F.2d at 1381, n.12; *Cabrini*, 497 F.Supp. 95, 96 (S.D.N.Y. 1980).

The very fact that the language of Section 505(a)(2) says Title VI remedies "*shall be available to*" persons aggrieved under Section 504, demonstrates Congress' intention to provide an expanded enforcement mechanism, not a more restricted one.

4. *The restrictions of Section 604 apply to federal departments and agencies, not to individuals.*

The language of Section 604, as stated above, limits its application to *federal departments and agencies.* Yet the Fourth Circuit in *Trageser* ignored this language, and with no analysis, "simply read these words out of the statute." *See Scanlon*, 677 F.2d at 1276 (opinion of Ferguson, J., dissenting). The *Trageser* court then took the remaining language of Section 604 and applied it to actions brought by private parties under Section 504.

> Section 604 does not, on its face, apply to private individuals. Accordingly, even were Section 604 deemed applicable to suits under the Rehabilitation Act, it would seemingly apply only to suits brought by federal agencies or departments and not suits brought by private individuals."

Jones, 681 F.2d at 1379, n. 7. *See also Carmi*, 620 F.2d at 678 (opinion of McMillian, J., concurring); *Hart*, 485 F.Supp. at 72.

Congress enacted Section 604 because of its concern that upon a single employment violation, federal agencies might threaten the existence of important programs by invoking their power to cut off funds. *See LeStrange*, 687 F.2d at 778 (opinion of Weiss, J., concurring). Section 604's purpose was to limit this powerful government sanction which a department or agency can apply against a recipient. Senator Hubert Humphrey, a sponsor of the Civil Rights Act of 1964, emphasized that individuals

can go to court to enforce their employment rights under Title VII, 42 U.S.C. §§ 2000e-2000e-17, but that Section 604 was specifically designed to restrict fund cut-offs by "preclud[ing] action by a Federal agency under Title VI." 110 Cong. Rec. 12720 (1964); *see also id.* at 5255. Thus, Section 604 was never intended to restrict the rights of private parties, only to prevent "administrative overkill." *LeStrange*, 687 F.2d at 778 (opinion of Weiss, J., concurring). Similarly, Section 604 cannot be read to limit the actions of individuals pursuing their rights under Section 504.

5. The structure of Section 505 demonstrates Congress' intent to promote administrative efficiency in the enforcement of Title V's provisions.

The Fourth Circuit in *Trageser* found further support for its narrow view of employment rights under Section 504 in Section 505(a)(1) of the 1978 Amendments, 29 U.S.C. § 794a(a)(1), which extended Title VII remedies to the enforcement of Section 501 of the Rehabilitation Act. The *Trageser* court erred in reasoning that Congress' failure to extend Title VII remedies to Section 504 complainants as it did to Section 501 complainants indicates a congressional intent not to cover employment under Section 504. To the contrary, since Section 501 deals solely with (federal) employment discrimination, Congress logically chose Title VII remedies. Title VII was adopted to provide individuals remedies to employment discrimination and it is enforced by the Equal Employment Opportunity Commission (EEOC), which handles similar issues in other employment areas.

Section 504, on the other hand, reaches all forms of discrimination against handicapped people such as housing, education, and health care. This wide coverage is patterned after Title VI's ban on discrimination in all programs and activities receiving federal financial assistance. It was only natural that Congress would, therefore, look to Title VI remedies for enforcement of Section 504.

See Hart, 485 F.Supp. at 72-73. Congress realized that extending Title VII remedies to Section 504 would require the EEOC, for the first time, to resolve non-employment issues. Other funding agencies have routinely made these determinations in race and sex cases pursuant to their Title VI and Title IX responsibilities. Congress thus concluded it would be administratively consistent to follow Title VI remedies for violations of Section 504. The Senate Committee that wrote Section 505(a)(2) confirmed this view when they stated that applying the procedural provisions of Title VI to Section 504 would assure "administrative due process, and provide for administrative consistency within the Federal Government." *S. Rep. No. 95-890*, 95th Cong., 2d Sess. 19 (1978). *See also S. Rep. No. 93-1297*, 93d Cong., 2d Sess. 39-40 (1974), *reprinted in* [1974] U.S. Code Cong. and Ad. News 6373, 6390.

6. *The postenactment history of Section 504 rejects* Trageser.

The postenactment history of Section 504 is extremely valuable in determining Congressional intent. Congress' failure to repeal or amend HEW's interpretation connotes acquiescence in the agency's interpretation.[8] *See North Haven*, 456 U.S. at 531-33; *Cannon v. University of Chicago*, 441 U.S. 677, 687, n.7 (1979). Moreover, the many positive statements by legislators support the above interpretation of employment coverage under Section 504.

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[8] In 1977 Congress held oversight hearings on the implementation of Section 504. Throughout these hearings, legislators discussed Section 504, its coverage of employment, and the recently promulgated HEW Section 504 regulations. *See Implementation of Section 504 of the Rehabilitation Act of 1973: Hearings before the Subcommittee on Select Education of the House Committee on Education and Labor*, 95th Cong., 1st Sess. 51-57, 63-64, 68, 71, 73-74, 207, 214-15, 241, 243, 247, 253-54, 259, 294-95, 303, 315-19, 341, 426-30, 460-63, 464, 470 (1978). At that time, as in 1978, Congress knew of HEW's interpretation of Section 504 as covering employment regardless of the purpose of the federal funding, and made no attempt to limit its scope.

> "Although the statements of one legislator made during debates may not be controlling, . . . , Senator Bayh's remarks, as those of the sponsor of the language ultimately enacted, are an authoritative guide to the statute's construction. *See* eg., *FEA v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976) (such statements 'deserve to be accorded substantial weight . . . .')."

North Haven, 456 U.S. at 526-27.

Indeed, as indicated above, it was the statements of not just one, but many legislators, demonstrating the broad scope of Section 504's coverage of employment discrimination without the limitations imposed by *Trageser*.

In 1979, the *Trageser* analysis was specifically criticized by the Senate Committee on Labor and Human Resources, the Committee which reported out the original act and the 1978 Amendments:

> "[*Trageser*] is not consistent with Congress' original and continuing intent that handicapped individuals be empowered to bring suit in Federal District Court for alleged employment discrimination in violation of title V regardless of the designated use of the Federal funds received by the employer in question."

S. Rep. No. 316, 96th Cong., 1st Sess. 13 (1979); *see Scanlon*, 677 F.2d at 1273 (opinion of Ferguson, J., dissenting); *LeStrange*, 687 F.2d at 776.

D. Administrative Interpretations Of Section 504 Support Coverage Of Employment Discrimination Without Regard To The Purpose Of Federal Funding.

The administrative agencies which have promulgated regulations to enforce Section 504 have been consistent in their coverage of employment discrimination regardless of the purpose of the federal assistance. The Department of Health, Education, and Welfare, the lead agency in coordinating enforcement of Section 504, promulgated

regulations which specifically covered employment. 45 C.F.R. Part 84, subpart B.

The Department of Justice, which in 1980 was transferred the authority to coordinate enforcement of Section 504, *see* Executive Order 12250 (1980), reviewed the legislative history of the Rehabilitation Act and its amendments, HEW's administrative construction, the remedial nature of Section 504 and the legislative history of Section 505, before rejecting the *Trageser* analysis. *See* 28 C.F.R. §§ 42.501-.540 (1980).

> "In construing a statute, this Court normally accords great deference to the interpretation . . . of the agency charged with the statute's administration. *See*, e.g., *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-275 (1974); *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 381 (1969)."

North Haven, 456 U.S. at 522, n.12. *See also Udall v. Tallman*, 380 U.S. 1, 16-18 (1965).

Recently in *Guardians Association*, Justice White pointed out:

> ". . . [W]e should not reject them [Title VI regulations] absent clear inconsistency with the face or structure of the statute, or with the unmistakable mandate of the legislative history."

51 U.S.L.W. at 5108.

In this case, both the language of the statute and the legislative history support the administrative interpretations of Section 504 covering employment.

II. SECTION 504 CONFERS A PRIVATE RIGHT OF ACTION.

Petitioner admits that it did not argue in the courts below that Section 504 provides a private right of action "because the law in the Third Circuit and other circuits on this question appeared to be well settled." Petitioner's Cert. Petition at 21. Now Petitioner is raising in this

Court the issue of a private right of action. It is established that this Court will not consider issues that are not raised before or considered by the District Court or the Court of Appeals. *Miree v. Dekalb County*, 433 U.S. 25, 33-34 (1977); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147, n.2 (1970).

In any event, all courts of appeals that have decided the issue have held that Section 504 confers a private right of action.[9]

A. *Cannon* And *Guardians Association* Compel The Conclusion That Section 504 Confers A Private Right Of Action.

This Court held in *Cannon v. University of Chicago*, 441 U.S. 677 (1979), that Title IX of the Education Amendments of 1972 confers a private right of action. *Cannon* is especially applicable to the present case for at least two important reasons. First, Section 504 "was patterned after, and is almost identical to . . . section 901 [Title IX] of the Education Amendments of 1972. . . ." *S. Rep. No. 93-1270*, 93d Cong., 2d Sess. 27 (1974). Second, the administrative procedures for enforcement under Section 504 are identical to those used to enforce Title IX. *See* 45 C.F.R. §§ 84.61 and 84.71.

Recently, in *Guardians Association v. Civil Service Commission of the City of New York*, No. 81-431, 51 U.S.L.W. 5105 (U.S. July 1, 1983), this Court noted the existence

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[9] *Kampmeier v. Nyquist*, 553 F.2d 296 (2d Cir. 1977); *NAACP v. Medical Center, Inc.*, 599 F.2d 1247 (3d Cir. 1979); *Davis v. Southeastern Community College*, 574 F.2d 1158 (4th Cir. 1978), *rev'd on other grounds*, 442 U.S. 397 (1979); *Prewitt v. United States Postal Service*, 662 F.2d 292 (5th Cir. 1981); *Lloyd v. Regional Transportation Auth.*, 548 F.2d 1277 (7th Cir. 1977); *United Handicapped Federation v. Andre*, 558 F.2d 413 (8th Cir. 1977); *Kling v. City of Los Angeles*, 633 F.2d 876 (9th Cir. 1980); *Pushkin v. Regents of Univ. of Colorado*, 658 F.2d 1372 (10th Cir. 1981).

of a private right of action under Title VI, *see* 51 U.S.L.W. at 5108-09, which is analogous to Section 504. *See* pp. 13, 19, *supra*.

B. A Private Right Of Action Can Be Implied Under *Cort v. Ash*.

Even if *Cannon* and *Guardians Association* are not viewed as dispositive, consideration of the four factors identified in *Cort v. Ash*, 422 U.S. 66, 78 (1975), to determine whether a private remedy is to be implied, shows that Congress intended Section 504 to confer a private right of action in favor of handicaped individuals.

First, respondent is "one of the class for whose *especial* benefit the statute was enacted." *Cort*, 422 U.S. at 78. The Senate Committee Report on the 1974 Amendments to the Act proclaimed, "Section 504 was enacted to prevent discrimination against *all handicapped individuals* . . . in relation to Federal assistance in employment, housing, transportation, education, health services, or any other Federally-aided programs." *S. Rep. No. 1297*, 93d Cong., 2d Sess. 38 (1974), *reprinted in* [1974] U.S. Code Cong. & Ad. News 6373, 6388 (emphasis added). *See also Kampmeier v. Nyquist*, 553 F.2d at 299 ("Section 504 . . . is designed specifically for their protection"); and *Lloyd v. Regional Transp. Auth.*, 548 F.2d at 1285, n. 25.

Section 7(7) of the Rehabilitation Act, 29 U.S.C. 706(7), *as amended*, defines "handicapped individual" as any person who:

> "(i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment."

Thomas LeStrange's partial amputation of his forearm qualified him as a "handicapped individual" with the

meaning of Section 7(7). He therefore meets the first *Cort* factor.

Second, the Rehabilitation Act and its legislative history show that Congress intended to create a private remedy under Section 504. *See Cort*, 422 U.S. at 78. The Committee Report on the 1974 Amendments states that:

> "This approach to implementation of section 504, which closely follows the models of [Title VI and Title IX] . . ., would ensure administrative due process (right to hearing, right to review), provide for administrative consistency within the Federal government as well as relative ease of implementation, and *permit a judicial remedy through a private action.*"

S. Rep. No. 93-1297, 93d Cong., 2d Sess 40 (1974) (emphasis added).

This intent is confirmed by the addition of an attorney's fee provision to Title V of the Act in the 1978 Amendments, Section 505(b), 29 U.S.C. § 794(b). The legislative history underlying this attorneys' fee provision supports this reading. The Senate report on Section 505(b) states:

> "The committee believes that the rights extended to handicapped individuals under title V, that is, Federal Government employment, physical accessibility in public buildings, employment under Federal contracts, and *nondiscrimination under Federal grants*—are, and will remain in need of constant vigilance by handicapped individuals to assure compliance, and the *availability of attorney's fees should assist in vindicating private rights of action* in the case of section 502 and 503 cases, *as well as those arising under section 501 and 504.*"

S. Rep. No. 95-890, 95th Cong., 2d Sess. 18 (1978) (emphasis added).

A similar attorney's fees provision in Title VI, construed by this Court in *Cannon*, led to the conclusion that

"[t]he language of this provision explicitly presumes the availability of private suits to enforce Title VI. . . ." 441 U.S. at 699.

Furthermore, in *Cannon*, the Court found persuasive evidence of legislative intent to provide a private remedy in ". . . that Congress intended to create Title IX remedies comparable to those available under Title VI and that it understood Title VI as authorizing an implied private cause of action . . . ." 441 U.S. at 703. Similarly, when Congress patterned Section 504 after Title VI in 1973, it was aware of court decisions finding a private right of action under Title VI.[10]

Third, the implication of a private right of action under Section 504 is consistent with the underlying purposes of the legislative scheme. *See Cort*, 422 U.S. at 78. As with Title IX, the language and legislative history of Section 504 reveal that Congress sought to accomplish two purposes through its enactment: to avoid the use of federal resources to support the discriminatory practices forbidden by Section 504, and to provide individuals an effective remedy against those practices. As with Title IX, the first purpose is served by the administrative enforcement procedures established under Section 504 for termination of federal financial assistance to entities engaged in discriminatory practices outlawed by Section 504. But the administrative enforcement mechanism under Section 504 is identical to that used to enforce Title IX;[11] it suffers from the same deficiencies that led this

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[10] Senate floor debate in 1978 on Section 505(a)(2)—which applied Title VI rights and remedies to Section 504—reveals that Congress was keenly aware of judicial precedent on the private right of action issue. *See* 124 Cong. Rec. 30349 (remarks of Senators Bayh and Cranston).

[11] The regulations HEW adopted to implement Section 504 incorporate the Title VI enforcement procedures. *See* 45 C.F.R. § 84.61 (1979).

Court to find a private remedy complementary to and not destructive of that administrative enforcement mechanism under that statute.

As this Court noted in *Cannon*, 441 U.S. at 704, the remedy of terminating federal financial assistance—the only sanction available under the administrative enforcement scheme—is a draconian and ineffective means of remedying individual instances of discrimination. An agency found to have discriminated will be cut off from funding, but the individual victim of discrimination will not benefit at all. Indeed, the individual complainant is not even granted a role in the agency investigation and enforcement proceedings. A private remedy which focuses on the aggrieved individual and permits a court to provide individually tailored relief is therefore a far more appropriate and effective remedy. In the context of other civil rights statutes, this Court has recognized that suits by persons acting as "private attorneys general" are an invaluable supplement to administrative enforcement. *See Allen v. State Bd. of Elections*, 393 U.S. 544, 556 (1969); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 211 (1972); *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401-402 (1968). In view of the large numbers of federally funded programs covered by Section 504, ". . . the Act's laudable goal could be severely hampered . . . if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General." *Allen*, 393 U.S. at 556. Recognition of both private and public enforcement mechanisms will thus enhance the realization of Congress' objectives in enacting Section 504.

Fourth, the cause of action is not one traditionally relegated to state law and in an area basically of concern to the state. *See Cort*, 422 U.S. at 78. The statute prohibits discrimination and applies to recipients of *Federal* funds. *See Cannon*, 441 U.S. at 708-09.

Whether *Cannon* and *Guardians Association* be viewed as dispositive or the factors in *Cort* be independently analyzed, Section 504 clearly creates a private right of action.[12]

CONCLUSION

For the foregoing reasons, we request this Court to affirm the judgment of the Court of Appeals.

Respectfully submitted,

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[12] This amici curiae brief does not discuss the merits of petitioner's claims regarding compensatory relief under Section 504 and the program-specific nature of the statute. As stated in the Summary of Argument, *supra*, p. 5, these issues were neither raised nor considered in the courts below, and therefore are not properly before this Court.